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IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-626

MITSUI O.S.K. LINES, LTD., *Petitioner*

v.

STRACHAN SHIPPING COMPANY, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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v.

STRACHAN SHIPPING COMPANY, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

To The Honorable The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Petitioner, Mitsui O.S.K. Lines, Ltd. prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause.

OPINION BELOW

The district court, by its Memorandum and Order of October 21, 1971, made detailed findings of fact and conclusions of law which were supplemented on November 12, 1971, and December 10, 1971. Those Orders are attached hereto as Appendix B. The Opinion of the United States Court of Appeals for the Fifth Circuit and the dissenting Opinion of Judge Thornberry of that Court

is reported at 479 F.2d 432 (1973) and is reproduced in Appendix A to this Petition. The Order of the Court of Appeals denying petitioner's timely Petition for Rehearing is reproduced in Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 1973. Rehearing was denied on July 9, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the contributory negligence of the plaintiff-longshoreman constitute, as a matter of law, a breach by the stevedore-employer of its warranty of workmanlike performance to the ship?

2. Should the vessel be denied indemnity against the stevedore because the damages recoverable against the vessel have been reduced by a finding of contributory negligence?

STATEMENT OF THE CASE

This case is a familiar three-party suit initiated by longshoreman Preston Julian against petitioner, Mitsui O.S.K. Lines, Ltd. (hereinafter called the "ship"), the owner of the vessel on which Julian was working when he was hurt. The ship, in turn, filed an action for indemnity against respondent Strachan Shipping Company (hereinafter called "stevedore"), the stevedoring company which employed the plaintiff when he was hurt. The district court found the vessel to be unseaworthy, but found that the plaintiff's negligence contributed 95% to cause the accident since his actions were "so grossly careless that

a court might characterize the injury as wholly self-inflicted." (Conclusion of Law 5). The district court, however, denied indemnity on findings of no breach of warranty by the stevedore and conduct sufficient to preclude indemnity by the ship, even though the district court had found that the ship's unseaworthy condition "was not particularly formidable to those who follow an active trade and its hazards might easily have been avoided by the use of ordinary care" by the plaintiff, the stevedore's employee. (Conclusion of Law 5).

The ship appealed the denial of indemnity. The Court of Appeals held that the trial court's finding of no breach of warranty was clearly erroneous since, "the longshoreman's contributory negligence was so substantial as to require the conclusion that the stevedore breached its warranty of workmanlike performance." With Judge Thornberry dissenting, however, the majority affirmed the denial of indemnity on the following grounds:

> "The district court was presented with a situation of negligence imputed to the stevedore on the one hand and unseaworthiness on the part of the ship on the other. The Court could not prorate damages but they were in fact prorated by the contributory negligence holding and the subsequent holding on indemnity. The court left a 5% charge against the shipowner for unseaworthiness by denying indemnity. Under the 'factor' rule, we cannot say this was error."

The facts of the accident are very simple. The plaintiff was injured when he stepped down from a winch platform to the main deck of the vessel, some 23 inches below. (S.F. 2) [Finding of Fact (2)]. As he stepped down, "he lost his balance and fell to the main deck,

sustaining the injuries here complained of." (S.F. 5) [Finding of Fact (5)]. The trial court described the plaintiff's actions as follows:

> "Plaintiff attempted to negotiate the 26½ inch step down from the winch deck by merely stepping forward as if it were an ordinary step. He did not look down to the main deck before stepping. He did not turn sideways and lower himself a leg at a time. More significantly, he did not take the perfectly natural precaution of supporting himself by grasping the available hanger winch frames as he stepped down. Plaintiff obviously knew of the necessity to make a long step from the winch deck because the step was plainly visible and he had stepped up onto the same deck two hours before. In view of this knowledge, *plaintiff's choice of method for negotiating the step was careless, imprudent, and revealed an almost reckless lack of regard for his own safety.*" [Finding of Fact (5)] (Emphasis added)

The trial court, however, also found that the failure to have a step or ladder between the main deck and the winch platform rendered the vessel unseaworthy. The court said in Finding of Fact (3):

> "Although the record is somewhat less complete on the point than might be desired, the Court must conclude that this means of access to and egress from the winch deck (and the No. 5 hold) was not reasonably fit for its intended purpose."

Based upon these facts, the trial court made the following Conclusion of Law:

> "(5) Plaintiff was contributorily negligent. *Although the step did constitute an unseaworthy condition, it was not particularly formidable to those who follow an active trade and its hazards might easily have*

been avoided by the use of ordinary care. The manner in which the plaintiff descended the step was so grossly careless that a court might reasonably characterize the injury as wholly self-inflicted, thus reducing the recovery by 100%. However, such a disposition would not be in keeping with the spirit of *Manning v. M/V SEA ROAD,* 417 F.2d 603 (5th Cir. 1969), which teaches that the application of comparative negligence should seldom, if ever, result in the complete exoneration of unseaworthiness. Accordingly, by reason of his own negligence, plaintiff's recovery shall be reduced by 95%." (Emphasis added)

Despite these findings, the district court refused to grant indemnity to the ship.

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit's decision conflicts with decisions of the Courts of Appeal for the Second, Fourth and Ninth Circuits.

The ship's cause of action for indemnity against the stevedore is based upon breach of the stevedore's implied warranty of workmanlike performance. *Ryan Stevedoring Co., Inc. v. Pan-Atlantic S.S. Corp.,* 350 U.S. 124 (1956). The Second, Fourth and Ninth Circuits have held that the contributory negligence of the plaintiff-employee is a breach of the stevedore's warranty as a matter of law. Second Circuit: *Damanti v. A/S Inger,* 314 F.2d 395 (2d Cir. 1963) cert. denied 375 U.S. 834; *Nicroli v. Den Norske Afrika,* 314 F.2d 651 (2d Cir. 1964); *Mortensen v. A/S Glittre,* 348 F.2d 383 (2d Cir. 1965); *McLaughlin v. Trelleborgs Angfartygs A/B,* 408 F.2d 1334 (2d Cir. 1969), cert. denied 395 U.S. 946; and *Hartnett v. Reiss Steamship Company,*

421 F.2d 1011 (2d Cir. 1970), cert. denied 400 U.S. 852. Fourth Circuit: *United States Lines, Inc. v. Jarka Corp. of Baltimore,* 444 F.2d 26 (4th Cir. 1971) and *Chinese Maritime Trust, Ltd. v. Carolina Shipping Company,* 456 F.2d 192 (4th Cir. 1972). Ninth Circuit: *Arista Cia de Vapores, S.A. v. Howard Terminal,* 372 F.2d 152 (9th Cir. 1967).

The Court of Appeals for the Fifth Circuit in this case rejected those authorities and held that the rule in the Fifth Circuit was that the contributory negligence of the plaintiff was only "a factor" to be taken into consideration on the issue of the breach of the stevedore's implied warranty of workmanlike performance. After noting that the 1972 amendments to the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. § 901, abolished the ship's cause of action for indemnity against the stevedore-employer, the Court said:

> "Without further consideration of the previous decisions of this Circuit *or the conflict with those of the other Circuits,* we note that Congress has removed the underlying basis for the decision. Moreover, we are not convinced that our prior decisions are unsound." (Emphasis added)

Thus, the Court of Appeals' decision in this case expressly created a conflict between the Circuits. Only this Court can resolve that conflict. Although the amendments to the Compensation Act may reduce the number of future cases of this kind, those amendments do not have any effect upon the thousands of pending cases arising out of accidents occurring before the effective date of the amendments. Further, even under the new statute, there are many kinds of cases in which *Ryan* theories of indemnity are involved, which are unaffected

by the amendments, either because the injury is to a person not covered under the Act (for instance, seamen, certain shoreside workers, etc.), or the plaintiff bringing the original action is not suing a "vessel" as defined by Section 2, Paragraph (21) of the Act [33 U.S.C. § 902(21)], or because the action for indemnity is not being brought against an "employer" as defined by the Act. The continuing vitality of *Ryan* indemnity requires resolution of this conflict between the Circuits.

2. By denying indemnity solely because the District Court "in fact prorated" the damages by its contributory negligence finding, the Court of Appeals adopted a new theory for denying indemnity, a theory which not only should not be the law but conflicts with this Court's decisions in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952) and *Atlantic Coast Line R. Co. v. Erie Lackawana R. Co.*, 406 U.S. 340 (1972).

The Court of Appeals found that the plaintiff's contributory negligence "was so substantial as to require the conclusion that the stevedore breached its warranty of workmanlike performance." This result was reached by applying the Fifth Circuit's "a factor" rule to the undisputed facts. The Court of Appeals then denied indemnity, however, on the following completely new legal theory:

> "The district court was presented with a situation of negligence imputed to the stevedore on the one hand and unseaworthiness on the part of the ship on the other. The court could not prorate damages but they were in fact prorated by the contributory negligence holding and the subsequent holding on indemnity. The court left a 5% charge against the

> shipowner for unseaworthiness by denying indemnity. Under the 'factor' rule, we cannot say this was error."

This reasoning by the majority was not supported by citation to any authority, and indeed no authority supports this novel approach. To put this new theory in perspective it is appropriate to summarize briefly developments in the law in this field before this decision by the Fifth Circuit. In *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946) and *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406 (1953), this Court held that longshoremen and other shoreside workers did the traditional work of seamen and thus could recover against the vessel not only for negligence but also for unseaworthiness. In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.,* 342 U.S. 282 (1952), the Court held that the ship did not have a right of contribution against the employer of these quasi-seamen since, in the absence of legislation, there was no right of contribution among joint tort feasors in non-collision admiralty cases. The doctrine of unseaworthiness, however, imposed liability without fault upon the vessel, frequently for unseaworthy conditions created by actions of the stevedore. Thus in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.,* 350 U.S. 124 (1956), the Court held that the vessel could recover indemnity against the stevedore if the accident was caused by the breach by the stevedore of an implied warranty of workmanlike performance owing to the vessel. The ship's right of indemnity arose by reason of the contractual relationship between the ship and stevedore. As a natural corollary of that doctrine, the Court held in *Weyerhaeuser S.S. Co. v. Nacirema Operating Co., Inc.,* 355 U.S. 563 (1958), that the ship owner may recover indemnity even though negligent in some respect, provided

the ship owner is free from "conduct on its part sufficient to preclude indemnity." 355 U.S. at 567.

The "conduct to preclude indemnity" defense of the stevedore has been rather extensively elaborated, primarily in decisions of the Courts of Appeals. The Fifth Circuit, in *Waterman S.S. Corp. v. David,* 353 F.2d 660 (1965), cert. denied 384 U.S. 972, held that the ship's right of indemnity is defeated only if "a vessel's unseaworthiness prevents the stevedore's workmanlike performance, . . ." 353 F.2d at 665. Perhaps the fullest elaboration of the doctrine is contained in *Southern Stevedoring & Contracting Co. v. Hellenic Lines, Ltd.,* 388 F.2d 267 (5th Cir. 1968), where the Court said:

> "Whether or not the total conduct of [the shipowner] was sufficient to preclude recovery is determined by the law of contract, [citations omitted] in that such conduct, to preclude indemnity, must be sufficient to bar the enforcement of the contract. [citations omitted] *The vessel's unseaworthiness, although a proximate cause of the accident, is not in itself conduct necessarily sufficient to preclude recovery.* [citations omitted] Without entering the thicket of primary and secondary, or active and passive negligence, [citation omitted], the trier of fact must weigh the substantiality of the fault of the shipowner against the breach of warranty by the stevedore to determine whether the former's conduct is 'sufficient to preclude indemnity.' [citation omitted]
>
> "The rule which has been forged for application in this process is that *only conduct on the part of the shipowner which prevents the stevedore's workmanlike performance is sufficient to preclude indemnity.* [citations omitted] However, in our case, it was not the unseaworthiness of the ship which prevented Southern's workmanlike performance, but rather the

> breach of warranty by Southern which brought into play the unseaworthiness of the vessel to produce the accident. The trial court found the unseaworthiness of the vessel should never have been brought into play and that if Southern had adhered to its warranty of workmanlike performance, the latent defect in the swivel hook would not have been tested." 388 F.2d at 271-272 (Emphasis added)

Consistent application of these principles to this case clearly shows that the ship was not guilty of any conduct sufficient to preclude indemnity as a matter of law. Since the plaintiff's contributory negligence contributed 95% to cause the accident and the unseaworthiness of the vessel only 5% to cause the accident, and since the unseaworthy condition "was not particularly formidable to those who follow an active trade and its hazards might easily have been avoided by the use of ordinary care," one must conclude that the unseaworthiness of the vessel did not *prevent* a workmanlike performance by the stevedore. Any holding that there was conduct sufficient to preclude indemnity would not only conflict with the standards previously elaborated by the Fifth Circuit, but would also be in conflict with decisions of the Second and Fourth Circuits in *Mortensen v. A/S Glittre,* supra, and *U.S. Lines v. Jarka,* supra, where there was found to be no conduct sufficient to preclude as a matter of law.

The Court of Appeals in this case, however, did not follow the established principles dealing with conduct sufficient to preclude indemnity but, instead, created a new theory for denying indemnity based upon proration of damages. This new theory should be rejected completely and not allowed to be established in the law.

First, this new theory is predicated on an erroneous legal assumption. It assumes that, because the plaintiff's

damages have been mitigated by contributory negligence, all that the ship is going to have to pay is the amount of damages attributable solely to its primary liability. That assumption is incorrect because it ignores the well-settled rule that the ship's indemnity claim is not only for amounts it must pay to the plaintiff, but also for attorneys' fees and expenses incurred in the defense of the case, *even when the ship's defense is successful.* See, e.g., *Strachan Shipping Company v. Koninklyke Nederlanesche,* 324 F.2d 746 (5th Cir. 1963); *SS LENA LUCKENBACH v. Walsh Stevedoring Company,* 395 F.2d 217 (5th Cir. 1968). To allow the ship to recover its attorneys' fees and expenses when it is completely successful, but to deny recovery for attorneys' fees and expenses when it is only 95% successful, is not only irrational but would revive the long-discredited idea that a ship cannot recover indemnity simply because there is a finding of unseaworthiness or primary negligence. See, e.g., *Crumady v. The Joachim Hendrik Fisser,* 358 U.S. 423 (1959). That notion was put to rest long ago, perhaps so long ago that the majority of the panel of the Fifth Circuit deciding this case simply forgot about it. The majority's opinion has simply unfairly denied the ship its chance to recover that sum from the stevedore, even though the negligence of the stevedore contributed 95% to cause the accident. In *Arista Cia. de Vapores, S.A. v. Howard Terminal, supra,* attorneys' fees and expenses were the only items of damage to the ship involved in the case.

Second, the reasoning of the majority is unsound because it is an express effort by the Court of Appeals to make an allocation of damages in an indemnity case in violation of the rule of *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., supra.* That rule was rather

firmly reaffirmed last year in *Atlantic Coast Line Railroad Company v. Erie Lackawana Railroad Company, supra.* If the reasoning of the Court of Appeals is followed to its logical conclusion, then the ship, in the very least, should be entitled to recover 95% of its fees and expenses.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be issued from this Court to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition for Writ of Certiorari has been served upon Mr. Theodore Goller, attorney for respondent, Strachan Shipping Company, at the lawfirm of Fulbright, Crooker & Jaworski, Bank of the Southwest Building, Houston, Texas, 77002, on this the 5 day of October, 1973, by certified mail, return receipt requested.

Joseph D. Cheavens

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2259

PRESTON JULIAN,
Plaintiff-Appellee,

versus

MITSUI O.S.K. LINES, LTD., In Personam,
and M/V MEIJYUSAN, In Rem,
Defendant-Third Party
Plaintiff-Appellant,

versus

STRACHAN SHIPPING COMPANY,
Third Party
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

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(May 23, 1973)

Before BELL and THORNBERRY, Circuit Judges and GROOMS, District Judge.

BELL, Circuit Judge: This case arises out of the familiar *Sieracki-Ryan*[1] longshoreman-shipowner-stevedore

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1. *Seas Shipping Co. v. Sieracki*, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099; *Ryan Stevedoring Co. v. Pan-Atlantic S/S Corp.*, 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133.

admiralty dispute. The injured longshoreman sued the shipowner alleging both unseaworthiness of the ship and negligence of its officers, agents and crew. The district court found the ship unseaworthy, but reduced the longshoreman's damages by 95 per cent as a result of his contributory negligence. In the shipowner's third party complaint against the stevedore to recover any damages paid to the longshoreman, the district court held that the shipowner was not entitled to indemnity from the stevedore. Two reasons were given in support of the judgment for the stevedore: (1) that the stevedore did not breach its warranty of workmanlike performance; and (2) that the shipowner, by furnishing an unseaworthy vessel, hindered the stevedore's performance so as to preclude indemnity.

This appeal involves only the indemnity claim by the shipowner against the stevedore. The question presented is whether the longshoreman's contributory negligence is merely a factor to be weighed in determining whether the stevedore has breached its warranty of workmanlike performance, or whether any contributory negligence constitutes a breach of the stevedore's warranty as a matter of law.

The rule in this Circuit is that contributory negligence ". . . is a factor to be taken into consideration on the issue of breach of the contractor's [stevedore's] implied warranty." *Lusich v. Bloomfield Steamship Company*, 5 Cir., 1966, 355 F.2d 770, 778. See also *United States Lines Co. v. Williams*, 5 Cir., 1966, 365 F.2d 332, 336; *D/S Ove Skou v. Hebert*, 5 Cir., 1966, 365 F.2d 341, 350. Cf. *Diaz v. Western Ventures, Inc.*, 5 Cir. 1972, 467 F.2d 1361, 1362-3.

We are asked to reconsider our position in light of the rule prevailing in the Second, Fourth, and Ninth Circuits, that any contributory negligence on behalf of the longshoreman is imputed to the stevedore and constitutes a breach of the stevedore's warranty as a matter of law. See e.g., *McLaughlin v. Trelleborgs Angfartygs A/B*, 2 Cir., 1969, 408 F.2d 1334; *United States Lines v. Jarka Corp.*, 4 Cir., 1971, 444 F.2d 26; *Arista Cia. DeVapores, S.A. v. Howard Terminal*, 9 Cir., 1967, 372 F.2d 152.[2]

Under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 USCA § 901 *et seq.*, the longshoremen's right to sue a shipowner is limited to claims based upon negligence of the shipowner alone. The doctrine of unseaworthiness is no longer available to injured longshoremen. The effect of limiting the shipowner's liability to his own negligence is to obviate the need for indemnity from the stevedore. Consequently the amendments provide that the stevedore employer shall not be held liable to a shipowner for damages paid by the shipowner to longshoremen and any warranties to the contrary shall be void. 33 USCA § 905(b). These amendments did not become effective until November 1972. The instant case was tried in 1971 and final judgment in the district court was entered on March 21, 1972.

Without further consideration of the previous decisions of this Circuit or the conflict with those of the other circuits, we note that Congress has removed the underlying basis for the decisions. Moreover, we are not convinced

2. The Third Circuit has taken a position somewhat near the rule of this Circuit. See *Shaw v. Lauritzen*, 3 Cir., 1970, 428 F.2d 247, 251, where the court approved a jury instruction which provided: "If you find [the Stevedore's negligence] was a substantial factor in causing the injury, the shipowner . . . is entitled to recover against the Stevedore. . . ."

that our prior decisions are unsound. We thus proceed to the merits on the "factor" approach.

The district court found that the longshoreman's conduct was "so grossly careless that a court might characterize the injury as wholly self-inflicted." However, the court did find that the ship possessed a defectively designed step which rendered it unseaworthy. Therefore, the court actually reduced the longhoreman's damages by 95 per cent rather than 100 per cent, stating that application of comparative negligence principles should seldom result in complete exoneration of unseaworthiness. In view of these findings, we hold that the longshoreman's contributory negligence was so substantial as to require the conclusion that the stevedore breached its warranty of workmanlike performance. This result follows even though we apply the rule that contributory negligence is only a factor to be considered in deciding whether the warranty is breached.

Finding a breach of the stevedore's warranty, we proceed next to the question whether the shipowner's conduct was as the district court held, sufficient to preclude indemnity. The district court found that the ship was "defectively designed and unseaworthy because the only available route by which a longshoreman might proceed from the No. 5 hold to the main deck involved a 26½ inch drop for which no ladder or step had been provided". The longshoreman in the instant case injured himself while trying to negotiate this 26½ inch drop.

The district court was presented with a situation of negligence imputed to the stevedore on the one hand and unseaworthiness on the part of the ship on the other. The court could not prorate damages but they were in fact prorated by the contributory negligence holding and

the subsequent holding on indemnity. The court left a five percent charge against the shipowner for unseaworthiness by denying indemnity. Under the "factor" rule we cannot say that this was error.

AFFIRMED.

THORNBERRY, Circuit Judge, dissenting:

Although, as the majority points out, the 1972 amendments to the Longshoremen's and Harbor Workers' Act greatly diminish the importance of this case as precedent, our duty to decide it correctly is not diminished. With deference, I must disagree with one important aspect of the majority's reasoning and with the result it reaches.

First, in considering the question of the stevedore's breach of warranty of workmanlike performance, I believe we should follow the *per se* rule of the Second, Fourth, and Ninth Circuits that the longshoreman's negligence constitutes a breach of warranty of workmanlike performance as a matter of law. This rule accords better with the precedents and with logic than the majority's factor approach. If the longshoreman's negligence is imputed to the stevedore—and it is imputed in this Circuit as in others, *see United States Lines Company v. Williams*, 5th Cir. 1966, 365 F.2d 332, 334 n.4—then it is difficult to understand how the stevedore, having negligently contributed to the cause of an accident through the acts of the longshoreman, might nevertheless avoid breaching its warranty of workmanlike performance, the essence of which is to perform its work "properly and safely." *Ryan Stevedoring Company v. Pan-Atlantic S/S Corporation*, 1955, 350 U.S. 124, 133, 76 S.Ct. 232, 237. *Lusich v. Bloomfield Steamship Company*, 5th Cir. 1966, 355 F.2d 770 and *United States Lines Company v. Wil-*

liams, supra, upon which the majority rely, do contain language supporting the factor approach, but I do not read them to establish that approach in this Circuit. Those cases reversed because the trier of fact had failed to consider the longshoreman's negligence at all on the question of breach of warranty, but did not limit the scope of that consideration to that due a "factor" or otherwise preclude the *per se* approach. In this case, of course, the *per se* approach yields the same results as the factor approach of the majority: the warranty of workmanlike performance was breached.

On the question whether the district court clearly erred in finding the shipowner was guilty of such conduct as to preclude indemnity I disagree with the majority's result. The only fault of the shipowner was furnishing a ship with a twenty-six and one-half inch step—a condition found to be unseaworthy. The district court concluded, "Although the step did constitute an unseaworthy condition, it was not particularly formidable to those who follow an active trade and its hazards might easily have been avoided by the use of ordinary care." The defectiveness of the step contributed only five percent to the cause of the accident. In these circumstances, when the shipowner's conduct is weighed against the stevedore's breach of warranty of workmanlike performance, *Waterman S/S Corporation v. David*, 5th Cir. 1966, 353 F.2d 660, I do not believe the shipowner's conduct could reasonably be found sufficient to preclude recovery to which it would otherwise be entitled. Its conduct did not "prevent or seriously handicap the stevedore in his ability to do a workmanlike job." *Albanese v. N.V. Nederl. Amerik Stoomv.*, 2nd Cir. 1965, 346 F.2d 481; *see also* Corbin on Contracts § 1264.

Accordingly, I would reverse the judgment below denying indemnity.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2259

PRESTON JULIAN,
Plaintiff-Appellee,

versus

MITSUI O.S.K. LINES, LTD., In Personam,
and M/V MEIJYUSAN, In Rem,
Defendant-Third Party
Plaintiff-Appellant,

versus

STRACHAN SHIPPING COMPANY,
Third Party
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion May 23, 1973, 5 Cir., 1973, ____F.2d____).

(July 9, 1973)

Before BELL and THORNBERRY, Circuit Judges and GROOMS, District Judge.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

THORNBERRY, Circuit Judge, dissenting: I dissent as to the denial of the petition for rehearing.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION No. 69-G-168

PRESTON JULIAN,

Plaintiff,

versus

MITSUI O.S.K. LINES, LTD., ET AL,
and M/V MEIJYUSAN, In Rem,
Defendant and Third Party
Plaintiff,

versus

STRACHAN SHIPPING COMPANY,
Third Party
Defendant.

(Filed October 2, 1971)

MEMORANDUM AND ORDER

Plaintiff, a longshoreman, brings this suit to recover for personal injuries sustained when he slipped and fell while working aboard the M/V MEIJYUSAN MARU as she was moored on navigable waters at Galveston, Texas. The vessel and its owners, Mitsui O.S.K. Lines, Ltd., joined as third-party defendant the stevedore contractor, Strachan Shipping Company. The cause came on for trial September 27 and 28, 1971, and the Court now enters its findings of fact and conclusions of law. Rule 52, Fed. R. Civ. P.

Findings of Fact

(1) On the morning of April 13, 1969, plaintiff and his gang of longshoremen reported for work at the No. 3 hatch of defendant vessel, but were immediately ordered to proceed aft to the No. 5 hatch to complete the loading of cotton bales there.

(2) The deck area between the forward coaming of the No. 5 hatch and the aft coaming of the No. 4 hatch was occupied by a raised winch deck containing winches, masts, booms, and other equipment. This winch deck, or platform, was 23 inches tall and had a 3½ inch coaming around its perimeter. Accordingly, the distance from the main deck to the top of the winch deck coaming was 26½ inches. There was no ladder or steps to assist a person in stepping onto or down from this winch deck.

(3) The ladder leading down into the No. 5 hold was attached to the forward hatch coaming on the centerline of the vessel. The upper end of this ladder led to the winch deck. Therefore, if a person on the main deck wished to enter the hold, it was necessary to first step up onto the winch deck at some point along its perimeter. Conversely, in climbing the ladder to emerge from the No. 5 hold, one found himself on the winch deck confronting a 26½ inch step down in order to move elsewhere on the ship. There was no practical alternative route, and the long step could in no way be avoided. Although the record is somewhat less complete on the point than might be desired, the Court must conclude that this means of access to and egress from the winch deck (and the No. 5 hold) was not reasonably fit for its intended purpose.

(4) In proceeding from the No. 3 to the No. 5 hold, plaintiff's gang walked aft along the starboard, offshore

side of the main deck; climbed up the 26½ inches onto the starboard, offshore side of the winch deck; walked across the winch deck to the upper end of the ladder; and, climbed down into No. 5 hold.

(5) After working in the hold for about two hours, the gang was ordered to return to No. 3 hatch. Plaintiff, the first man in line, climbed the ladder out of No. 5 hold, emerged upon the winch deck, and walked across this deck to its port, inshore side. Plaintiff's route across the winch deck led him between two hanger winch drums located about the center of the winch deck's port side. These drums had rectangular frames approximately 3½ feet high, 3½ feet long, and 2½ feet wide. They stood about three feet apart and about eight inches from the edge of the winch deck. Having walked between these hanger winch frames, plaintiff reached the edge of the winch deck and undertook to step down to the main deck. In so doing, he lost his balance and fell to the main deck, sustaining the injuries here complained of. Additionally, either during the fall or during a premature attempt to right himself, plaintiff caught his foot in a plainly visible stanchion socket on the main deck.

(6) Testimony suggesting that plaintiff's fall may have been caused by grease on the deck is unconvincing and must be rejected. There is no direct and credible evidence supporting plaintiff's theory in this respect, which is little more than a hypothesis constructed upon the testimony of plaintiff and two other longshoremen to the effect that there was grease on one of plaintiff's shoes after the accident, as well as grease spots on the winch deck along plaintiff's path. Some of this testimony is weakened by prior inconsistent statements, and it is in any event flatly contradicted by the deposition of the cargo watch officer who inspected the area after the ac-

cident. Accordingly, it is found that plaintiff's fall was not caused by grease on the deck.

(7) Plaintiff attempted to negotiate the 26½ inch step down from the winch deck by merely stepping forward as if it were an ordinary step. He did not look down to the main deck before stepping. He did not turn sideways and lower himself a leg at the time. Most significantly, he did not take the perfectly natural precaution of supporting himself by grasping the available hanger winch frames as he stepped down. Plaintiff obviously knew of the necessity to make a long step from the winch deck because the step was plainly visible and he had stepped up onto the same deck two hours before. In view of this knowledge, plaintiff's choice of method for negotiating the step was careless, imprudent, and revealed an almost reckless lack of regard for his own safety.

(8) To the extent that any of the foregoing findings of fact constitutes conclusions of law, they are adopted as such.

Conclusions of Law

(1) This Court has jurisdiction over the parties and the subject matter.

(2) Plaintiff's injury was not proximately caused by grease on the deck. Therefore, consideration of the possible application of the Bureau of Labor Standards Longshoring Regulation relating to slippery conditions, 29 C.F.R. §1504.91(c), is unnecessary.

(3) The SS MEIJYUSAN MARU was defectively designed and unseaworthy because the only available route by which a longshoreman might proceed from the No. 5 hold to the main deck involved a 26½ inch drop for which no ladder or step had been provided.

(4) Third-party defendant, the stevedore contractor, did not breach its warranty of workmanlike performance. Accordingly, the vessel is not entitled to indemnity.

(5) Plaintiff was contributorily negligent. Although the step did constitute an unseaworthy condition, it was not particularly formidable to those who follow an active trade and its hazards might easily have been avoided by the use of ordinary care. The manner in which plaintiff descended the step was so grossly careless that a court might reasonably characterize the injury as wholly self-inflicted, thus reducing the recovery by 100%. However, such a disposition would not be in keeping with the spirit of *Manning v. M/V "Sea Road"*, 417 F.2d 603 (5th Cir. 1969), which teaches that the application of comparative negligence should seldom, if ever, result in the complete exoneration of unseaworthiness. Accordingly, by reason of his own negligence, plaintiff's recovery shall be reduced by 95%.

(6) To the extent that any of the preceding conclusions of law constitute findings of fact, they are adopted as such.

(7) The foregoing findings of fact and conclusions of law supersede in all respects those announced from the bench at time of trial.

The Clerk shall send copies of this Memorandum and Order to all counsel. Counsel for defendant shall submit a proposed form of judgment consistent with the foregoing, after approval as to form by all counsel, within 15 days.

DONE at Houston, Texas, this 21st day of October, 1971.

JAMES NOEL
James Noel
Judge

(Caption Omitted)

(Filed November 15, 1971)

SUPPLEMENTAL MEMORANDUM AND ORDER

Upon unopposed motion of third-party defendant for additional findings and conclusions, Rule 52(b), Fed. R. Civ. P., this Court's Memorandum and Order entered October 22, 1971, is hereby amended to include two additional conclusions of law, to wit:

> (8) The defendant shipowner by furnishing a defectively designed and unseaworthy vessel hindered the stevedore's performance and was guilty of conduct sufficient to preclude indemnity.
>
> (9) The third party defendant's workmen's compensation insurance carrier, Texas Employers' Insurance Association, shall recover the compensation and medical expenses paid to and on behalf of the plaintiff from any recovery ultimately awarded to the plaintiff herein.

The Clerk shall send copies of this Memorandum and Order to all counsel.

DONE at Houston, Texas, this 12th day of November, 1971.

JAMES NOEL
James Noel
Judge

(Caption Omitted)

(Filed December 13, 1971)

SUPPLEMENTAL MEMORANDUM AND ORDER NO. II

This tripartite longshoreman's suit having come on for trial, the Court entered its findings of fact and conclusions of law on October 22, 1971. The ship was found to be unseaworthy, but the longshoreman's recovery was reduced by 95% by reason of his contributory negligence. The stevedore was exonerated on the ground that it did not breach its warranty of workmanlike performance.

On November 1, 1971, the stevedore filed a motion for additional findings of fact and/or conclusions of law. Such a motion is authorized by Rule 52(b), Fed. R. Civ. P., and was duly placed on the motion docket and noticed to all parties for submission on November 8, 1971, the motion day. This procedure was in conformity with long-standing local practice, with which all parties were familiar. See Local Rules 24 and 25 (S.D. Tex.). Motion day having come and gone without expression of opposition or response of any kind by defendant vessel, the Court on November 12, 1971, granted the stevedore's motion and added to its findings and conclusions a Conclusion of Law (8), to-wit:

> (8) The defendant shipowner by furnishing a defectively designed and unseaworthy vessel hindered the stevedore's performance and was guilty of conduct sufficient to preclude indemnity.

On November 26, 1971, more than a fortnight after its opposition should have been made known to the Court, defendant vessel filed a motion to set aside the amendment, stating that "(a)lthough we neglected to file a formal opposition to that motion, that motion as regards to supplemental finding No. 8 was and is opposed." This motion to set aside has been timely opposed by the stevedore, and is now ripe for disposition.

Under the circumstances of the instant case, when the trier of fact weighs the substantiality of the ship's fault against the stevedore's relative innocence, cf. *Southern Stevedoring & Contracting Co. v. Hellenic Lines, Ltd.*, 388 F.2d 267, 271 (5th Cir. 1968), it is apparent that indemnity should be precluded. The 26½-inch drop from the winch deck to the main deck was a physical characteristic of the ship, and, as between the ship and the stevedore, the former was clearly "the party best situated to adopt preventive measures and thereby reduce the likelihood of injury." *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 425 (1964). Additionally, a finding of preclusion is entirely consistent with the Court's previous finding that the stevedore did not breach its warranty of workmanlike performance. *Waterman Steamship Corp. v. David*, 353 F.2d 660, 663 (5th Cir. 1965), cert. denied 384 U.S. 972 (1966).

Given the rather unusual factual situation here presented, where a subtly dangerous structural characteristic of the ship combines with a longshoreman's extraordinary carelessness to produce the injury, assignment of liability to the stevedore would be a bizarre and patently unjust result. In a factually analogous case involving defective ship design, United States District Judge Estes (sitting

by assignment in the Galveston Division), after finding contributory negligence on the part of the longshoreman but no breach of warranty by the stevedore, concluded that "(t)he shipowner's furnishing of the negligently designed and constructed access way and ladder which was the proximate cause of Maples' injury was conduct on the part of the shipowner sufficient to preclude its recovery of indemnity from the stevedoring company." *Maples' Case*, 1966 A.M.C. 2032, 2035 (S.D. Tex. 1966), aff'd sub nom. *D/S Sverre v. Texports Stevedore Co., Inc.*, 387 F.2d 648 (5th Cir. 1968) (per curiam), cert. denied 391 U.S. 914 (1968).

Being legally sound and supported by the evidence, Conclusion of Law (8) must stand. To the extent that it constitutes a finding of fact, it is, of course, adopted as such. Accordingly, defendant's motion to set aside is denied.

The Clerk shall send copies of this Memorandum and Order to all counsel.

DONE at Houston, Texas, this 10th day of December, 1971.

JAMES NOEL
James Noel
Judge